IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHANGĀREI-TERENGA-PARĀOA ROHE

CIV-2020-488-60
[2020] NZHC 2517

UNDER	the Sale and Supply of Alcohol Act 2012
IN THE MATTER	of an appeal against a decision of the Alcohol Regulatory and Licensing Authority at Kaitaia
BETWEEN	E R BELLAS LIMITED Appellant
AND	KARIKARI 2012 CHARITABLE TRUST INCORPORATION Respondent

Hearing: 17 September 2020

Appearances: D McGill for the Appellant
M Chen (via VMR) for the Respondent

Judgment: 25 September 2020

JUDGMENT OF GAULT J

This judgment was delivered by me on 25 September 2020 at 4:30 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors:
Mr D McGill, Duncan Cotterill, Auckland
Ms M Chen and Ms R Judd, Chen Palmer, Auckland

[1] E R Bellas Ltd appeals against the decision of the Alcohol Regulatory and Licensing Authority (the Authority) dated 13 July 2020,[1] reversing the decision of the Far North District Licensing Committee (the DLC) which renewed the appellant's on-licence.[2] Following the Authority's decision, the appellant's licence expires on 13 October 2020.

[2] The appellant also filed an application for a stay pending appeal. However, on 10 September 2020 Brewer J directed that the substantive appeal would be heard on 17 September 2020, negating the need for a hearing of the stay application.

Factual background

[3] The appellant operates the Tuatua Tavern located at 3 Tokerau Beach Road, Karikari Peninsula. The appellant is the third licensee of a tavern at this location since approximately 2008, having taken over the premises in October 2017. Mr Bellas is the sole director and shareholder of the appellant.

[4] The appellant initially operated the tavern pursuant to a temporary authority until it was granted its own on-licence on 14 December 2017 with effect from January 2018.

[5] The respondent is a charitable trust registered in 2012. The two trustees of the Trust are John McMahon and Lorraine McMahon. The respondent operates a childcare centre (Karikari Educare) at premises which neighbour the tavern, following resource consent to convert a backpackers in 2012. Mr McMahon's daughter, Ms McDonald, is a senior educator at Karikari Educare.

[6] Mr McMahon, chair of the respondent, has opposed applications for licences at the premises since approximately 2008, prior to the respondent being incorporated and the childcare centre being established. Those objections have all generally been dismissed.

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1 *Karikari Charitable Trust Inc v E R Bellas Ltd* [2020] NZARLA 106 (Authority decision).
2 *E R Bellas Ltd* NZDLCFN/01/355/RON [2019] (DLC decision).

[7] On 31 October 2018 the appellant applied to the DLC for a renewal of its on-licence. That application was opposed by several objectors, all or most of whom are affiliated with the childcare centre. Most of the objectors generally said that the weekday hours sought by the appellant should be reduced to 4:00 pm to midnight; that is, when the childcare centre is closed. But Mr McMahon (and possibly Mr and Ms McDonald)[3] raised concerns about the more fundamental threshold issue of whether the application met the object of the Sale and Supply of Alcohol Act 2012 (the Act).

[8] The DLC granted the application on certain conditions. Principally, the tavern was allowed to sell alcohol from Monday to Sunday 11:00 am to 12:00 midnight (excepting statutorily prohibited days).

[9] The respondent appealed the DLC decision to the Authority. The Authority allowed the appeal, deciding that it was not satisfied that:[4]

(a) renewal was consistent with the object of the Act; or that

(b) the appellant has appropriate systems, staff and training to comply with the law.

Approach on appeal

[10] Section 162 of the Act allows for appeals of Authority decisions on questions of law. The approach to appeals under s 162 was summarised by Gendall J in *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*:[5]

> This is an appeal pursuant to s 162 of the Act. It is limited to points of law alone. This Court will not interfere with a decision unless it can be shown that the decision maker erred in law, accounted for irrelevant matters, failed to account for relevant matters, or was plainly wrong.[6] Factual challenges,

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3 The parties disagreed on this, but nothing turns on it. The DLC decision records at [37] that Ms McDonald stated her objection would be met by the tavern operating Monday to Friday 4:00 pm to midnight.

4 Authority decision at [205].

5 *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* [2015] NZHC 2749, [2016] NZLR 382 at [17]. See also *Medical Officer of Health (Wellington Region) v Lion Liquor Retail* [2018] NZHC 1123, [2018] NZAR 882 at [25]; and *Lower Hutt Liquormart Ltd v Shady Lady Lighting Ltd* [2019] NZHC 3100, [2019] NZAR 403 at [29] and [73].

6 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [19]-[28]; *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50]-[58].

> whether raised squarely or obliquely, will not be entertained on appeals of this kind, save to the extent they are capable of establishing that the decision appealed is plainly wrong. This is necessarily a very high threshold.

[11] Mr McGill also referred to s 161, which states that every appeal is to be by way of rehearing, and submitted this may give somewhat broader scope when addressing whether a decision is plainly wrong. Section 161 appears more relevant to appeals under s 157. But s 162(2) refers to s 161 at least in relation to the application of rules of court. It is unnecessary to address the possible relevance of s 161 in s 162 appeals further since Mr McGill accepts the orthodox approach summarised by Gendall J.

Approach to issue of liquor licences

[12] There is no dispute as to the applicable legal principles. The issue of liquor licences is governed by Part 2 of the Act. Its purpose is set out in s 3:

> **3 Purpose**
>
> (1) The purpose of Parts 1 to 3 and the schedules of this Act is, for the benefit of the community as a whole,—
>
> (a) to put in place a new system of control over the sale and supply of alcohol, with the characteristics stated in subsection (2); and
>
> (b) to reform more generally the law relating to the sale, supply, and consumption of alcohol so that its effect and administration help to achieve the object of this Act.
>
> (2) The characteristics of the new system are that—
>
> (a) it is reasonable; and
>
> (b) its administration helps to achieve the object of this Act.

[13] The object of the Act is stated in s 4:

> **4 Object**
>
> (1) The object of this Act is that—
>
> (a) the sale, supply, and consumption of alcohol should be undertaken safely and responsibly; and
>
> (b) the harm caused by the excessive or inappropriate consumption of alcohol should be minimised.

(2) For the purposes of subsection (1), the harm caused by the excessive or inappropriate consumption of alcohol includes—

(a) any crime, damage, death, disease, disorderly behaviour, illness, or injury, directly or indirectly caused, or directly or indirectly contributed to, by the excessive or inappropriate consumption of alcohol; and

(b) any harm to society generally or the community, directly or indirectly caused, or directly or indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph (a).

[14] The criteria for issue of licences are set out in s 105:

105 Criteria for issue of licences

(1) In deciding whether to issue a licence, the licensing authority or the licensing committee concerned must have regard to the following matters:

(a) the object of this Act:

(b) the suitability of the applicant:

(c) any relevant local alcohol policy:

(d) the days on which and the hours during which the applicant proposes to sell alcohol:

(e) the design and layout of any proposed premises:

(f) whether the applicant is engaged in, or proposes on the premises to engage in, the sale of goods other than alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which goods:

(g) whether the applicant is engaged in, or proposes on the premises to engage in, the provision of services other than those directly related to the sale of alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which services:

(h) whether (in its opinion) the amenity and good order of the locality would be likely to be reduced, to more than a minor extent, by the effects of the issue of the licence:

(i) whether (in its opinion) the amenity and good order of the locality are already so badly affected by the effects of the issue of existing licences that—

(i) they would be unlikely to be reduced further (or would be likely to be reduced further to only a minor extent) by the effects of the issue of the licence; but

(ii) it is nevertheless desirable not to issue any further licences:

(j) whether the applicant has appropriate systems, staff, and training to comply with the law:

(k) any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made under section 103.

(2) The authority or committee must not take into account any prejudicial effect that the issue of the licence may have on the business conducted pursuant to any other licence.

[15] Section 131 contains the criteria for renewal of a licence:

131 Criteria for renewal

(1) In deciding whether to renew a licence, the licensing authority or the licensing committee concerned must have regard to the following matters:

(a) the matters set out in paragraphs (a) to (g), (j), and (k) of section 105(1):

(b) whether (in its opinion) the amenity and good order of the locality would be likely to be increased, by more than a minor extent, by the effects of a refusal to renew the licence:

(c) any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made by virtue of section 129:

(d) the manner in which the applicant has sold (or, as the case may be, sold and supplied), displayed, advertised, or promoted alcohol.

(2) The authority or committee must not take into account any prejudicial effect that the renewal of the licence may have on the business conducted pursuant to any other licence.

[16] As Clark J said in the renewal context in *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd*:[7]

> … the object of the Act is the first criterion when considering applications for renewals … Decision-making … is essentially rooted in a risk assessment. The factors to be considered in the course of assessing an application for a licence or for renewal … stand to be assessed in terms of their potential impact upon the prospective risk of alcohol-related harm.

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7 *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd* [2018] NZHC 1123, [2018] NZAR 882 at [43] and [46](c).

…

> A licensing committee or Authority, after having regard to the criteria for renewal in s 131, is then to step back and consider whether there is any evidence indicating that granting the application will be contrary to the statutory object in s 4.[8] Or, as Heath J articulated a "test":[9]
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> > Although the 'object' of the 2012 Act is stated as one of 11 criteria to be considered on an application for an off-licence, it is difficult to see how the remaining factors can be weighed, other than against the 'object' of the legislation. It seems to me that the test may be articulated as follows: is the Authority satisfied, having considered all relevant factors set out in s 105(1)(b)-(k) of the 2012 Act, that grant of an off-licence is consistent with the object of that Act?

[17] Finally, the legislature's expectation that alcohol-related harm will be minimised does not yield to a licensee's commercial or equitable interests.[10]

Grounds of appeal

[18] The notice of appeal raises four grounds:

(a) The Authority accounted for irrelevant matters in relation to new video evidence.

(b) The Authority erred in law by accepting certain video evidence without offering an ability to test it.

(c) The Authority erred in law by deciding to rescind, rather than modify the licence.

(d) The Authority's determination was plainly wrong and/or failed to account for relevant matters when considering and interpreting the findings of the DLC. This was characterised in submissions as the Authority being plainly wrong and/or erring at law in its consideration of the suitability test.

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8 *Auckland Medical Officer of Health v Birthcare Auckland Ltd* [2015] NZHC 2689, [2016] NZAR 287 at [50].

9 *Re Venus NZ Ltd* [2015] NZHC 1377, [2015] NZAR 1315 at [20].

10 *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd* [2018] NZHC 1123, [2018] NZAR 882 at [49]-[51].

[19] In submissions, Mr McGill sensibly addressed these grounds in reverse order. As there is some overlap, I retain the order in the notice of appeal except that I deal with the original video evidence ground (b) first.

Authority failed to account for relevant information by accepting video evidence without offering the ability to test it

[20] Mr McGill took issue with the approach of the DLC and the Authority to video evidence. Mr McGill submitted that he objected to the video evidence before the DLC essentially on privacy grounds and it was not played at the hearing. He understood it was being disregarded and did not cross-examine on its contents. The DLC, however, referred to the video evidence in its decision. Mr McGill also submitted that the video evidence hardly featured in the Trust's appeal before the Authority and again was not played at the hearing. But, without reference to the objection or the potential weaknesses of video footage, the Authority also relied on the video evidence, finding Ms McDonald's video evidence was the "most compelling".[11] The Authority referred to the DLC's comment about this evidence:[12]

> The evidence before the committee established a prima facie case that demonstrates a link between the on-licence and alcohol induced activities in the car park. The committee found the videos and images persuasive evidence when supported by the oral evidence of alcohol related harm occurring in the vicinity of Tuatua Tavern.

The Authority then said, having viewed the videos and photographs produced by Ms McDonald, the Authority agreed with the DLC's assessment of them.[13]

[21] Mr McGill submitted the Authority should have been alert to the possibility that the video footage showed behaviour that may well have been unacceptable in a broad sense but not of direct relevance to the matters to be considered when assessing an application for a licence.

[22] Mr McGill did not pursue inadmissibility or breach of natural justice as an error of law ground. As he also accepted that the weight given to evidence is a matter for

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11 Authority decision at [176].
12 Authority decision at [177].
13 Authority decision at [178].

the Authority,[14] his submission was essentially that the weight given to the video evidence was relevant to his wider ground that the decision was plainly wrong.

[23] I acknowledge that care is needed when drawing inferences of alcohol-related harm and particularly non-compliance from videos taken outside the premises. But the video evidence was not provided to me on appeal, so I am in no position to assess the correctness of the Authority's conclusions in relation to that evidence. No error of law is made out in relation to this ground.

Authority accounted for irrelevant matters in relation to new video evidence

[24] Mr McGill similarly took issue with the Authority's conclusions on new video evidence taken after the DLC decision and admitted on appeal.[15] The Authority said:

> [179] The new evidence is less compelling save that the videos produced by Ms McDonald reinforce that some of what was evident before the DLC hearing has continued afterwards.
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> [180] The incident on 30 May 2019 would appear to reinforce that patrons continued to show signs of intoxication on the premises as at that date. That must be tempered of course, by the fact that there is nothing to indicate whether this was allowed by the licensee or whether the patron was exiting the premises because she had been asked to leave.
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> [181] The incidents on 26 October 2019 and 13 February 2020, in turn, continue to indicate that well after the DIG decision, patrons still take alcohol from the premises and display signs of excessive consumption.
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> [182] The Authority considers that the gate being left open on 21 January 2020 was likely to be an oversight. That said, given the history and sensitivity of the issue of the gate which lead up to the imposition of the condition requiring the gate to be closed, it is a somewhat surprising oversight.

[25] My comments in relation to the earlier video evidence apply equally here too. The Authority did express a caution in paragraph [180] but, again, without the video evidence I am in no position to assess the correctness of the Authority's conclusion that the new videos reinforce what was evident before. No error of law is made out.

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[14] *Lower Hutt Liquormart Ltd v Shady Lady Lighting Ltd* [2019] NZHC 3100, [2019] NZAR 403 at [81].

[15] He did not take issue with the separate decision admitting the new evidence: *Karikari Charitable Trust Inc v E R Bellas Ltd* [2020] NZARLA 64.

Authority erred in law by deciding to rescind, rather than modify the licence

[26] This ground focuses on the fact that most objectors were only concerned with the hours of operation. Mr McGill submitted there was no cogent opposition to the licence. He submitted the Authority's decision went beyond what was necessary to meet the object of the Act. He also submitted the Authority failed to consider conditions to minimise alcohol-related harm.

[27] Mr McGill also referred to Mr McMahon's affidavit filed in this Court (in relation to the stay application), which stated that Mr McMahon had had a discussion with Mr Bellas about the Authority's decision on 18 July 2020 and said:

> I confirmed that if Mr Bellas made a new application for an on-license [sic] with the opening hours being 4:00 pm on weekdays that we would not oppose it.

[28] Noting that there was no opposition from those with statutory responsibilities to comment (the police, licensing inspector or medical officer of health), Mr McGill submitted the Authority's decision not to renew the appellant's licence altogether was a disproportionate response to the respondent's appeal to the Authority. He relied on the purpose of the Act in s 3, which refers to a system of control over the sale and supply of alcohol which is reasonable. He referred to the Court of Appeal's statement in *Meads Brothers Ltd v Rotorua District Licensing Agency* that the purpose of this reasonableness requirement is to ensure that the controls imposed under the Act should be neither excessive nor oppressive.[16] More recently, this Court has said that a reasonable regime would not permit conditions that are capricious or grossly disproportionate.[17]

[29] Ms Chen submitted there is a two-step test. The first step is determining whether renewing the licence would be consistent with the object of the Act, or whether the application is capable of meeting the object of the Act. If so, the second step is whether, and what, conditions need to be imposed.

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16 *Meads Brothers Ltd v Rotorua District Licensing Agency* [2002] NZAR 308 (CA) at [23].
17 *Capital Liquor Ltd v Police* [2019] NZHC 1846 at [79].

[30] I accept that the overriding question is whether granting the application is consistent with the object of the Act. But it does not follow that the issue of conditions is always irrelevant to that assessment and only to be considered at a second stage if the object of the Act can be met (effectively without conditions). It may be that in a particular case the object of the Act can be met by the imposition of conditions. In that sense, there may be overlap between the two steps. For example, proposed hours of operation is a mandatory consideration in s 105(1)(d). If the only respect in which an application did not meet the object of the Act were its proposed hours of operating, and a condition limiting those hours would minimise the alcohol-related harm so that the application did meet the object of the Act, I consider it would be open to the decision-maker to grant the application subject to that condition.

[31] In this case, I accept that the alcohol-related harm affecting the childcare facility could be minimised by limiting the Tavern's hours of operation to avoid the hours of operation of the childcare facility. But Mr McGill's submission that rescinding rather than modifying the licence was disproportionate effectively assumes that the Authority's decision was based on alcohol-related harm affecting the childcare facility, which does not appear to be the case. I return to this below.

[32] As both counsel noted, *Meads Brothers* was decided under the Sale of Liquor Act 1989, which the (new) Act has materially changed. One such change is that objection or adverse report is no longer a prerequisite to a refusal to renew.[18] But the reasonableness of the system is still a feature under s 3 of the Act and the Court of Appeal's statement that the controls imposed should be neither excessive nor oppressive still has application. In any event, however, the primary focus must be assessing whether, having considered all the relevant statutory criteria, renewal of the licence is consistent with the object of the Act. That is essentially the final ground of appeal, to which I turn next. I do not consider this ground of appeal materially adds to that ground.

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[18] Section 107, compared with s 23(2) of the 1989 Act.

Authority's determination was plainly wrong and/or erred at law in its consideration of the suitability test

[33] This ground is based substantially on the Authority's view that the DLC erred in its application of the test for renewal when it found that the appellant's application did not meet the object of the Act but that the appellant was nevertheless capable of succeeding in its application. Mr McGill submitted the Authority was wrong because the DLC did not conclude that the application did not meet the object of the Act. Mr McGill acknowledged that if the application did not meet the object of the Act, the application should not have succeeded.

[34] In challenging the Authority's view that the DLC had found that the application did not meet the object of the Act, Mr McGill relied on the following three key paragraphs of the DLC decision:

> [141] In regard to suitability, the committee considered the management of the premises pursuant to the current licence. In this regard the committee were not satisfied based on an assessment of the admissible evidence that that [sic] the applicant was administering the licence in accordance with the object of the Act and its licensing conditions.
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> …
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> [154] In regard to the evidence from the videos and photographs we are not satisfied that the applicant has demonstrated appropriate systems and processes to give effect to the object of the Act and its licensing conditions in the hours of the premises operation in the late evening.
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> …
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> [156] The committee considered the failure of the duty managers to adhere to Section 214 (Manager to be on duty at all times and responsible for compliance) specifically section (2) which states a manager on duty on any licensed premises is responsible for the compliance with and enforcement of the provisions of this Act and the conditions of the licence in force for the premises and the conduct of the premises with the aim of contributing to the reduction of alcohol related harm.

[35] Mr McGill submitted that paragraph [141] of the DLC decision was a comment about the appellant's administration of the (at the time current) on-licence, not a conclusion that the appellant was not "suitable" to hold an on-licence generally. Mr McGill submitted that the DLC was saying that in the past the licence may not have been administered in accordance with the object of the Act; it was not a

conclusion that the application – which is by definition about how the premises will be managed in the future – did not meet the object of the Act.

[36] Similarly, Mr McGill submitted that the DLC's conclusions in relation to systems and staff in paragraphs [154] and [156] related to past conduct and did not amount to conclusions that the application did not meet the object of the Act. Mr McGill referred to the DLC's subsequent statement that the evidence established a sufficient link between the on-licence and achieving the object of the Act, to such a degree, that it considered a graduated response mechanism in this application was warranted subject to amended conditions.[19] Mr McGill submitted that the DLC was saying that with no modifications to past practice there was a risk the appellant would not be a suitable applicant and/or that alcohol would be sold other than in accordance with the Act, but with the modifications presented in the application, the DLC was satisfied that the application met the object of the Act.

[37] Ms Chen supported the Authority's view of the DLC decision and submitted that evidence of past breaches is relevant to determining whether the object of the Act and other criteria for renewal are met. I accept that evidence of past breaches is relevant. It is an indicator of risk. I did not understand Mr McGill to submit otherwise.

[38] The Authority's characterisation of the DLC decision is evident from the Authority's decision at [188]:

> In finding that the application did not meet the object of the Act in terms of the applicant's suitability,[20] systems and processes,[21] and staff,[22] the application should not have succeeded. These findings by the DLC do not support the grant of the application. By imposing a truncated period and conditions, the DLC adopted a presumptive position that the licence should be renewed, notwithstanding its own findings about alcohol-related harm.

[39] I also accept that if the application did not meet the object of the Act, it should not have succeeded. The Authority was correct that such a finding would be fatal to the application.

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19 DLC decision at [158].
20 DLC decision at [141].
21 DLC decision at [154].
22 DLC decision at [156].

[40] Mr McGill's submission, however, was that the DLC did not make such factual findings. I accept Mr McGill's submission that the DLC's finding in paragraph [141] did not amount to a factual finding about suitability. Indeed, the DLC noted in subsequent paragraphs that suitability is defined broadly, and that the previous operation of premises is just one factor to be considered alongside others. Its subsequent acknowledgement that past problems are not fatal to suitability confirmed this.[23] I also accept that, in relation to systems and staff, the DLC did not make a factual finding that the application did not meet the object of the Act. It did say at [154] that from the videos and photographs it was not satisfied that the applicant had demonstrated appropriate systems and processes to give effect to the object of the Act and its licensing conditions in the hours of the premises operation in the late evening. But this, and the failure of the duty managers referred to in [156], was followed by the DLC's statement that the evidence established a sufficient link between the on-licence and achieving the object of the Act.[24]

[41] I therefore interpret the DLC's decision as being that it found past deficiencies, but notwithstanding that, in terms of its prospective risk assessment, it accepted the application did meet the object of the Act. I therefore accept Mr McGill's submission that the Authority appears to have somewhat mischaracterised the DLC decision. I consider this was a factual characterisation by the Authority rather than a legal error, taking into account an irrelevant consideration, or failing to take into account a relevant consideration, since the DLC's factual findings and reasons are not themselves relevant (statutory) criteria.

[42] In any event, the appeal to the Authority was by way of rehearing and it was open to, indeed incumbent upon, the Authority to form its own view on the evidence as to whether the application met the object of the Act, including by having regard to suitability, systems and processes, and staff. If the Authority considered the application did not meet the object of the Act, it should have allowed the appeal. Mr McGill acknowledged the Authority did go on to refer to its own evaluation of the evidence, but he submitted it carried over the erroneous characterisation of the DLC's assessment. He submitted the decision was not reasonable – it was plainly wrong.

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23 DLC decision at [151].
24 DLC decision at [158].

[43] Ms Chen submitted that, reading the Authority's decision as a whole, including its lengthy summary of the DLC hearing and decision and the new evidence on appeal, the Authority clearly conducted its own evaluation of the evidence and concluded that the application did not meet the object of the Act and the applicant was not suitable (including by reference to credibility).

[44] I accept Ms Chen's submission that the Authority's decision needs to be read as a whole. Mere omission is not a misdirection. The Authority need not refer individually to every piece of evidence.[25] Reasons can be incorporated by reference (whether to submissions, a decision under appeal, or otherwise). But reasons cannot otherwise be inferred from such background sections in a decision. Reasons must be stated.

[45] In this case, the Authority did make its own factual findings. In particular:

(a) The Authority said the evidence about alcohol-related harm included:[26]

- a darts tournament in January 2018 starting at 11.00 am which resulted in complaints from Karikari Educare day care about general noise, loud music, and objectionable and obscene language;
- patrons leaving the premises with open bottles of alcohol;
- bottles and broken glass have been found in the car park near Karikari Educare;
- a woman 'bonnet-surfing' a car one night in the carpark outside the front entrance to the tavern;
- on 15 January 2019 the gate to the outdoor area of the premises was open and children were able to see into the bar where patrons were drinking and smoking; and
- in the evenings there have been incidents of patrons showing signs of intoxication including that;
    - at about 7.45 pm on 20 December 2018 there was a fight in the carpark where swearing could be heard and bottles were smashed which led to the Police being called;

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25 *Medical Officer of Health (Wellington Region) v Lion Liquor Retail* [2018] NZHC 1123, [2018] NZAR 882 at [42].

26 Authority decision at [175].

- on 22 April 2019 patrons left the premises with bottles of alcohol in their hands, and a woman left the premises staggering and swaying and vomited on the grass verge; and
- at about 6.30 pm on 12 May 2019 people were seen drinking and smoking outside the bar and people showing signs of intoxication were walking around the carpark.

(b) As indicated at [20] above, the Authority agreed with the DLC's assessment referring to the videos and photographs as persuasive evidence when supported by the oral evidence of alcohol-related harm occurring in the vicinity of Tuatua Tavern.[27]

(c) As indicated at [24] above, the Authority also referred to the new video evidence as less compelling but reinforcing some continuation of what was evident before the DLC hearing.[28]

[46] Having then identified what the Authority considered to be the DLC's error, which I have already addressed, the Authority went on to say:

> [189] On its own evaluation of the evidence, the Authority is satisfied that notwithstanding that there is limited evidence of children being exposed to intoxicated patrons, excessive noise, swearing, yelling or fighting during the day, the evidence of alcohol-related harm is such as to suggest that the grant of the application, contrary to the object of the Act, will increase the risk of alcohol-related harm. This harm must be minimised and not condoned through a 'graduated response mechanism' and amended conditions which effectively provide for another probationary period. As Gendall J put it, "the reality of the position is that if the object of the Act cannot be achieved by the application, then it cannot succeed."
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> [190] Stepping back and considering whether there is any evidence indicating that granting the application will be contrary to the statutory object in s 4, the DLC erred by finding that the application did not meet a number of the criteria in the Act, but then concluded that the grant of the off-licence (sic) was consistent with the object of that Act subject to amended conditions. Moreover, these conditions, while purporting to address the risk of alcohol-related harm during the day, do little to abate the risk of alcohol-related harm in the evening.
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> [191] The Authority is satisfied that these grounds of appeal have been established.
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> [192] For completeness, the Authority does not find the reference to UNCROC to be of assistance. The judicial review decision of *Ye v Minister of*

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27 Authority decision at [176]-[178].
28 Authority decision at [179]-[182].

> *Immigration* involved New Zealand citizens who were the children of persons unlawfully in New Zealand, such that the parents' removal orders had a direct bearing on them. This application, on the other hand, is about the renewal of an on-licence. It is not one concerning children per se. Nevertheless, that the applicant premises are located nearby a 'sensitive site' (which has been acknowledged by E R Bellas Ltd), forms an important part of the context of the application when considering the risk of alcohol-related harm arising from the issue of the licence, as well as the applicant's suitability.
>
> [193] This vulnerability is heightened by the remoteness of the tavern and the fact that Constable Kalivati and Ms Maihi respectively said that there are not regular Police compliance checks of the premises, or inspections after work hours. Five Licensing Inspector checks during the day in five years is unlikely to portray a true picture of the operation of the premises in light of the evidence presented by Ms McDonald in particular. In such circumstances, the lack of opposition by reporting agencies needs to be considered in context.
>
> (footnotes omitted)

[47] I accept Mr McGill's submission that these paragraphs are coloured by the Authority's characterisation of the DLC decision. The Authority's decision was largely based on identifying what it considered to be an erroneous approach by the DLC. The key operative paragraphs of the Authority's decision in relation to its own evaluation are [189] and [190] as set out above, which I accept must be read in the context of the Authority's earlier factual findings.

[48] In [189], in relation to alcohol-related harm during the day, the Authority rightly stated that this must be minimised and if the object of the Act cannot be achieved, the application cannot succeed. But, as indicated above, the hours of operation are relevant to alcohol-related harm during the day, and the Authority did not address in this part of its decision whether alcohol-related harm would be minimised during the day if the hours of operation exclude operation during the day. However, the Authority later stated:

> [206] The Authority notes, however, that there is negligible evidence to conclude that a condition which restricts the opening hour of the premises to 4.00 pm would be a proportionate response to abate what is essentially a fear that alcohol-related harm which is evident in the evenings might, at some stage, occur before 4.00 pm. Such a fear is not supported by the evidence.

[49] This indicates that the Authority's decision was not based on a fear of alcohol-related harm during the day.

[50] In its conclusion, the Authority stated that it may be that an application for a 4:00 pm opening will not meet with any opposition but that is not a matter on which the Authority may speculate when determining the appeal.[29] As indicated above, Mr McMahon, who was opposed to limited hours of 4:00 pm to midnight, has indicated he would no longer oppose those hours.[30] Indeed, his 4 September 2020 affidavit stated that when the Authority asked what relief the Trust sought, the Trust's counsel stated that it was for the tavern to open no earlier than 4:00 pm on weekdays, and that if they had wanted the tavern to shut, they would have said so.

[51] In [190], the Authority then stated that the conditions do little to abate the risk of alcohol-related harm in the evening. While this is also a comment about the DLC decision, I accept that, read in the context of the Authority's decision as a whole including its own factual findings referred to above, the Authority made a finding that there was a risk of alcohol-related harm during the evening, which implicitly is not minimised, and therefore the application does not meet the object of the Act. This is also evident from the Authority's later reference to evaluation of the s 131 criteria:

> [205] In light of our findings in respect of the first and second grounds of appeal, it follows that the Authority is not satisfied that renewing the application is consistent with the object of the Act (s 131(1)(a) and s 105(1)(a)), or that E R Bellas Ltd has appropriate systems, staff, and training to comply with the law (s 131(1)(a) and s 105(1)(j)). Accordingly, the Authority need not make a finding on the appropriateness of the days on which and the hours during which the applicant proposes to sell alcohol (s 105(1)(d)).

[52] This indicates the Authority's decision was based on s 105(1)(a) (the object of the Act) and s 105(1)(j) (appropriate systems, staff, and training to comply with the law). It also confirms that the Authority considered those conclusions follow from its findings in relation to the DLC's error.

[53] Ms Chen submitted the Authority found that the applicant was not suitable (s 105(1)(b)). She referred to the list of considerations relevant to suitability in *Re Venus*,[31] and relied particularly on previous unlawful operation of premises. I consider the Authority accepted there was evidence of past non-compliance, but it

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29 Authority decision at [212].
30 At [27] above.
31 *Re Venus NZ Ltd* [2015] NZHC 1377, [2015] NZAR 1315 at [64].

did not make a finding that the applicant was not suitable. The Authority's references to suitability in [188] and [192] do not amount to such a finding.

[54] It follows that I do not consider the Authority made an error of law in relation to suitability.

[55] The final question is whether the Authority was plainly wrong in relation to its reasons for not renewing the licence on the basis of s 105(1)(a) (the object of the Act) and s 105(1)(j) (appropriate systems, staff, and training to comply with the law).

[56] Ms Chen relied on *Linwood Food Bar v Davison*,[32] where Dunningham J upheld a decision of the Authority not to renew a licence. Ms Chen submitted it had some factual similarities to this case. That case, however, was different in key respects. It was a rehearing appeal under the 1989 Act albeit having regard to the (new) Act. The Authority had concluded, and the Court upheld, that the applicant was not suitable. Also, the evidence of non-compliance included the proprietor's limited knowledge of the legal requirements and the need to have adequate procedures in place to minimise the risk of alcohol-induced harm. There was a particular incident of concern when both a security guard and duty manager were refusing entry to a large group after 1:30 am (when a one way door policy applied) and the proprietor intervened to persuade them otherwise.

[57] Ms Chen also relied on *Quin Quin Trading Company Ltd v Wilson*,[33] a decision of the Authority. She particularly referred to the Authority's conclusion in that case relating to s 105(1)(j):

> As already stated, the proposals to improve systems, staff and training within Plush have already proved ineffective. In light of this, the Authority is not satisfied that Qing Qing has appropriate systems, staff and training to comply with the law. It is simply not reasonable to assume that the evidence of staggering and vomiting on exiting Plush can be explained away by events that have occurred elsewhere.

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32 *Linwood Food Bar v Davison* [2014] NZHC 2980.
33 *Quin Quin Trading Company Ltd v Wilson* [2019] NZARLA 241.

[58] While in this case the Authority also referred to an incident involving vomiting (on 22 April 2019),[34] each case needs to be decided on its own facts.

[59] In this case, dealing first with s 105(1)(j), the difficulty is that the Authority did not state its reasons for not being satisfied the applicant has appropriate systems, staff and training to comply with the law other than its view that the result followed from the DLC's findings. Putting that view to one side, and acknowledging its reasons are to some extent implicit from its earlier factual findings, the Authority's decision lacks explicit reasons for its ultimate conclusion that it was not satisfied the applicant has appropriate systems, staff and training to comply with the law.

[60] However, while the Authority's reasons need to be decoupled from its characterisation of the DLC decision, that does not mean on this appeal limited to questions of law I should consider the risk assessment afresh. If the facts (at least as found on the evidence) can support the Authority's conclusion despite its reasoning being coloured by its view of the DLC decision, the Authority's decision is not plainly wrong.

[61] I consider the Authority's conclusion in relation to appropriate systems, staff and training was open to it. There was evidence to support it. Even acknowledging that alcohol-related harm does not necessarily indicate a licensee's non-compliance with the law, the Authority's own factual findings as to past alcohol-related harm are consistent with a lack of appropriate systems, staff and training to comply with the law at least in that period. Past failures may be the best predictor of future conduct, at least in the absence of compelling evidence as to improvements. It was not plainly wrong for the Authority to conclude that it was not satisfied the applicant has appropriate systems, staff and training to comply with the law.

[62] In relation to the Authority's conclusion that it was not satisfied that renewing the application was consistent with the object of the Act (s 105(1)(a)), I have referred at [51] above to the Authority's finding about the risk of alcohol-related harm during the evening. Given that finding, the Authority's earlier factual findings as to past alcohol-related harm and the same acknowledgement of past failures as a predictor of

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[34] See [45](a) above.

future conduct, the Authority's conclusion was also open to it on the evidence. It was not plainly wrong.

[63] Although the appellant has not reached the very high threshold for a question of law appeal, I endorse the Authority's comment that an application for a 4:00 pm opening on weekdays would appear to address the risk of alcohol-related harm before 4:00 pm (when the childcare centre is open). It would then remain for the applicant to address the prospective risk assessment in relation to alcohol-related harm during the evening, and the related need for appropriate systems, staff and training to comply with the law, by showing the improvements made.

Result

[64] The appeal is dismissed.

[65] The respondent is entitled to 2B costs, having ultimately succeeded. I encourage the parties to agree costs. If they cannot be agreed, I will receive memoranda (not exceeding three pages) on behalf of the respondent within 10 working days and on behalf of the appellant within a further 5 workings days. I will then determine costs on the papers unless I need further assistance from counsel.

Gault J